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SUPREME COURT OF THE UNITED STATES

RIVERCLIFF COMPANY, INC. ..... *Petitioner*

v. No. .....

W. E. LINEBARGER and R. W. LINEBARGER, d/b/a LINEBARGER CONSTRUCTION COMPANY and UNITED STATES FIDELITY AND GUARANTY COMPANY ..... *Respondents*

PETITION FOR REVIEW ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ARKANSAS

A. REPORTS OF OPINIONS DELIVERED IN THE COURT BELOW

This is a petition for a writ of certiorari to review the Order of the Supreme Court of Arkansas denying this petitioner's petition for a re-hearing of the cause herein on grounds that the Court's former refusal to decree recovery for petitioner denied the petitioner of a vested contract right in violation of the due process and equal protection clauses of the Fourteenth Amendment to the Constitution of the United States. The official publications of the opinions of the Supreme Court of Arkansas have not yet been printed. The copy of the Order denying the petition for rehearing is appended hereto as Appendix A. The copy of the petition for a re-hearing raising the constitutional question is appended hereto as Appendix B. A copy of the opinion rendered by the Supreme Court

of Arkansas prior to the petition for a re-hearing is appended hereto as Appendix C, which has been published unofficially in Volume 97, No. 14, The Law Reporter, opinions delivered by the Supreme Court of Arkansas February 8, 1954, at page 622.

B. STATEMENT OF JURISDICTION

On February 8, 1954, the Supreme Court of Arkansas found in its Decree (Appendix C) that it would cost $73,565.00 to replace and correct the construction defect committed by the respondents in the construction of four apartment buildings for the petitioners, but rendered judgment only in the sum of $1,612.80, the value of the construction if it had been originally performed according to the contract between the parties. On February 19, 1954, petitioner filed a petition for a re-hearing of the cause on grounds that a new issue in the case had been presented by the Decree and findings of the State Supreme Court. The specific grounds for this petition were that the contract provided that the respondents were liable for the cost of the complete replacement and correction of defective performance and for the cost of correcting all consequential damages caused by the correction of the defects, and that the Supreme Court's refusal to decree recovery for such costs denied the petitioner the vested contract right in violation of the due process and equal protection clauses of the Fourteenth Amendment to the Constitution of the United States. This petition further prays that a re-hearing be granted on the issue and the Decree be modified and damages for the cost of the correction of the defect be awarded the petitioner according to the finding of the Court, and for all other proper relief (Appendix B).

On March 15, 1954, the Supreme Court of Arkansas entered an Order denying the petition for re-hearing, two

Justices dissenting and one not participating (Appendix A). On June 3, 1954, Mister Justice Tom C. Clark entered an Order of this Court extending the time to file this petition to and including August 2, 1954, a copy of which Order is appended hereto as Appendix D.

Section 1257 (3), Title 28 U.S.C.A., provides that final decrees rendered by the highest court of a State may be reviewed by this Court by writ of certiorari where any right is specifically set up or claimed under the Constitution of the United States. This section is found on page 89 of Title 28, U.S.C.A., Sections 1251 to 1330, and is quoted as follows:

> "Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:
>
> "(3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States."

The petitioner's right, claimed under the Constitution of the United States, was specifically set up and claimed in the petition for re-hearing on February 19, 1954, following the decision entered in the cause on February 8, 1954, eleven days after the original decision was rendered. The provisions of Section 27-2142, Vol. 3, Ark. Stats, 1947 Anno., at page 485, provide that no decision of the Arkansas Supreme Court shall become final until fifteen judicial days from the time of the decision and if a pe-

tition for re-hearing be filed within that time, all proceedings upon the decision shall be suspended until the petition shall be acted upon by the Court. Section 27-2142, *supra*, is quoted as follows:

> "The Supreme Court may make rules for the convenient dispatch of business, the preservation of order, the argument of cases, or motions, the manner and time of presenting motions or petitions for re-hearing, the time of issuing its mandates and decisions and modes of enforcing its mandates and orders, and may change the same. *Provided, no mandate shall issue or decision become final until after fifteen* (15) *judicial days from the time the decision was rendered, unless the court, for good cause shown, shall otherwise direct. If a petition for re-hearing be filed before the time for the decision to become final, as above specified all proceedings upon the decision and mandate therein shall be suspended until petition for re-hearing shall be acted upon by the court.* Provided, the court in term time, or a judge thereof in vacation, may enlarge the time for filing petitions for re-hearing, not exceeding thirty (30) additional days, and order that all proceedings upon the decision be stayed during such time. But the party applying for an extension or enlargement of time for filing a petition for re-hearing must do so within fifteen (15) judicial days from the time the decision was rendered and show good cause for such enlargement and reasonable notice of the application must first be given the opposite party or his attorney of record. Any order for an extension of time made by a judge of the court shall be subject to the order of the court" (emphasis supplied).

The constitutional issue was timely raised in the State Supreme Court by the petition for re-hearing, and the State Court's decision thereon did not become final until its Order denying the petition for re-hearing on March 15, 1954. Section 2101(c) of Title 28 U.S.C.A., which is

found on page 67, 28 U.S.C.A., Sections 1961 to 2280, is quoted as follows:

> "Any other appeal or any writ of certiorari intended to bring any judgment or decree in a civil action, suit or proceeding before the Supreme Court for review shall be taken or applied for within ninety days ater the entry of such judgment or decree. A justice of the Supreme Court, for good cause shown, may extend the time for applying for a writ of certiorari for a period not exceeding sixty days."

On June 3, 1954, within ninety days after the entry of the final order of the court below, Mister Justice Tom C. Clark entered an Order of this Court extending the time to file petition for writ of certiorari to and including August 2, 1954, a period not exceeding sixty days. Thus, it appears that this petition for a review by certiorari of the final decision of the Arkansas Supreme Court denying the petitioner a right claimed under the Constitution of the United States has been properly raised and timely filed within the certiorari jurisdiction of this Court.

C. QUESTIONS PRESENTED FOR REVIEW

The building contract between the petitioner and the respondents provides that the respondents shall remove from the premises all materials condemned by the architect as failing to conform to the contract, and shall promptly replace and re-execute the work in accordance with the contract and bear all the expense of making good other work destroyed or damaged by such removal or replacement. The Supreme Court of Arkansas found that the respondents admitted the contract and admitted the defect in the performance of the contract in that they substituted a hard brick mortar in an expansion joint designed in the buildings for a soft, pliable oakum material specified by the contract, and which substitution constituted a breach

of the building contract (Appendix C). The court below further found that it would cost the sum of $73,565.00 to remove and replace the condemned defective materials due to the necessary destruction or damage caused to the finished work surrounding the defect which would be caused by such removal or replacement. On the ground that the consequential damages would be so extensive, the court below allowed the petitioner to recover only the cost to the respondents if they had constructed the expansion joints correctly originally, which amounted to the sum of $1,612.80.

The petitioner's petition for re-hearing to the Supreme Court of Arkansas specifically points out that under the specific findings of fact by the Supreme Court it would cost $73,565.00 to remove and replace the defective materials, and that the right of the petitioner to recover that amount was vested by his contract with the respondents. The petition for re-hearing further asserts that the State Court refusal to decree recovery therefor denied the petitioner the vested contract right in violation of the due process and protection clauses of the Fourteenth Amendment to the Constitution of the United States, and prayed that a re-hearing be granted on the issue and that the decree be modified accordingly (Appendix D).

The Supreme Court of Arkansas denied the petitioner the right of re-hearing and its prayer for modification of the Supreme Court's decree. Thus, the question presented for review on this petition is whether a property right vested by contract is within the protection of the due process or equal protection clauses of the Fourteenth Amendment to the Constitution of the United States, and whether the State Supreme Court's refusal to enforce such right is a denial of due process of law prohibited by the said Fourteenth Amendment.

D. CONSTITUTIONAL PROVISIONS

The only Federal law involved in this petition for review is that part of the 14th Amendment to the Constitution of the United States which provides as follows:

> "* * * nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

E. STATEMENT OF THE CASE

This action grows out of a building contract, dated July 8, 1947, between petitioner, Rivercliff Company, Inc., hereinafter referred to as Owner, and the respondents, W. E. Linebarger and R. W. Linebarger d/b/a Linebarger Construction Company, hereinafter referred to as Contractor. Respondent, United States Fidelity and Guaranty Company executed the completion bond jointly with the Contractor as Surety. By the terms of the contract, the contractor undertook to construct four six-story apartment buildings and two auxiliary buildings for the Owner according to the Owner's plans and specifications which specifically included Articles 1 to 44 of the General Conditions of the Contract of the Standard Form, current edition of the "American Institute of Architects". The total contract price was $1,140,870.00, which was fully paid or allowed the contractor. The material portions of said contract are appended hereto as Appendix E and are found on page 4 of the abridged transcript of the Record as Exhibit 1. The material portions of the joint completion bond are appended hereto as Appendix F and are found on page 6 of the abridged transcript of the Record as Exhibit 2.

Articles 19 and 20 of the General Conditions of the Contract as precribed by the Standard Form of the American Institute of Architects were entered in evidence as

Exhibit 80 (R.8), and the material parts of which are quoted as follows:

> "Art. 19. *Correction of Work Before Final Payment.*—The Contractor shall promptly remove from the premises all materials condemned by the Architect as failing to conform to the Contract, whether incorporated in the work or not, and the Contractor shall promptly replace and re-execute his own work in accordance with the Contract and without expense to the Owner and shall bear the expense of making good all work of other contractors destroyed or damaged by such removal or replacement.
>
> * * * * *
>
> "Art. 20. *Correction of Work After Final Payment.*—Neither the final certificate nor payment nor any provision in the Contract Documents shall relieve the Contractor of any responsibility for faulty materials or workmanship and, unless otherwise specified, he shall remedy any defects due thereto and pay for any damage to other work resulting therefrom, which shall appear within a period of one year from the date of substantial completion. The Owner shall give notice of observed defects with reasonable promptness. All questions arising under this article shall be decided by the Architect subject to arbitration."

In the construction of the buildings, the Contractor failed to install the expansion joint between the exterior brick masonry walls and the interior reinforced concrete framework of the buildings as designed in the detail drawings of the architect (Sheet A-8, Exhibit 112, R.10). Instead of building this joint with a pliable oakum material and waterproofing same with the mastic caulking compound as outlined by the detail drawings, the Contractor admittedly filled this joint with a hard brick mortar. There were forty-eight of these expansion joints designed for the

four apartment buildings and were to continuously run the entire height of the six-story buildings.

This condition was noted by the architect who condemned the same and specified its removal on November 13, 1948, in a letter to the Contractor (Exhibit 37, R.11). On December 6, 1948, following final inspection by the architect, the architect notified the Contractor by letter (Exhibit 15, R.13) that the condition was not acceptable and would not have the architect's approval until corrected by removing the brick mortar filling the expansion joint and replacing the same with oakum and mastic compound as per plans and specifications. The material part of this Exhibit is appended hereto as Appendix G.

On December 13, 1948 (Exhibit 38, R.14), the Contractor acknowledged to the architect that the specified correction work was in progress and that the balance unfinished at settlement date would be allowed in cash. The material parts of this Exhibit are appended hereto as Appendix H.

On December 15, 1948 (Exhibit 7, R.15), the parties agreed in writing to pay the Contractor the balance of the contract price with the provision that such final payment should not constitute a waiver each to the other of any claim presently held by either party. The recited purpose of this agreement was to enable the parties to expedite the closing of the permanent financing of the building project with the mortgagee.

On October 12, 1949, the architect informed the Contractor that,. following the inspection for defective workmanship and materials within one year after susbtantial completion of the contract on December 15, 1948, the defective expansion joint condition still existed. The architect further condemned the defective work and specified

its removal and replacement according to plans and specifications (Exhibit 63, R.24).

This litigation originated with numerous claims and counter claims by both the Owner and the Contractor, all but one of which issues are immaterial to the question here, and which have been eliminated from the record by designation. By way of Count 2 of its amended cross complaint against the Contractor (R.1), the Owner alleged that the general conditions of the contract provided that the Contractor should remedy any defects due to faulty materials or workmanship and pay for any damage to other work resulting therefrom, and further alleged that the Contractor had wholly failed and refused to complete the correction work to the expansion joints in complete default of the General Conditions of the contract. The cross complaint prayed judgment against the Contractor and his surety, the United States Fidelity and Guaranty Company, for the cost of replacing the expansion joints according to the plans and specifications of the contract. The material parts of this count of the cross complaint as amended are appended hereto as Appendix J. The contractor answered by a general denial of Count 2 (R.3). The entire cause was referred to a Master in Chancery to take the evidence and report his findings.

The Master received in evidence some 1500 pages of transcribed testimony in addition to 157 exhibits, and reported his findings and conclusions to the Chancellor in a written report, the material parts of which are found in the record at page 25 and appended hereto as Appendix K. The Master specifically found that it would cost the sum of $73,565.00 to remove the mortar filling the expansion joint, replace the expansion joint and repair all the consequential damages claimed by the Owner to result from such repair work, and that solely installing the ex-

pansion joint as required would require the expenditure of $1,612.80. The Master further found that the Owner had not satisfied the burden of proof of any additional or consequential damages other than the installation of the joint alone and allowed the Owner to recover the sum of $1,612.80 under its contract with the respondents.

The Owner duly excepted to the report of the Master on this issue on the ground that it was contrary to the evidence and the law and based upon incompetent evidence which should be excluded from the record. The Owner further prayed that the findings of the Master be set aside and judgment entered as prayed in Count 2 of its amended cross complaint (R.27). The petitioner's exception to the Master's report is appended hereto as Appendix L.

The Chancellor overruled the petitioner's exceptions to the Master's report on this issue, adopted the report as the decree of the Court, with the exception of the correction of a mathematical error on other issues not involved here; duly noted the petitioner's exceptions and granted an appeal to the Supreme Court of Arkansas (R.28). The material parts of the decree affecting the issues herein are appended hereto as Appendix M.

The appeal and cross appeal were lodged in the Supreme Court of Arkansas and the cause heard on the briefs and oral arguments of the parties. One of the assignments of error by the Owner in his argument on appeal was that the evidence was undisputed that the defective expansion joint could not be removed and correctly replaced without causing extensive damages to the adjacent brick walls and to the interior walls of the apartment buildings, and that the trial court erred in denying recovery to the Owner for the cost of repair of these consequential damages. In this regard, the Supreme Court found as a mat-

ter of fact, in its opinion filed February 8, 1954 (R.29), as follows:

> "The evidence shows that the Contractor made efforts to extract the mortar from the joints and replace it with oakum but found it impracticable to do so because the condition of the brick walls was such that, in the effort, adjacent bricks would be disturbed or damaged and that the interior walls of the apartments would also be extensively damaged. In fact, it appears that, to entirely correct the situation, it would have been necessary to practically remove and rebuild the corners. This being the situation, it appears that it would do more harm than good to merely dig the mortar from the joints and replace it with oakum. For this reason, the Master gave appellant the amount it would have cost the Contractor to build the joints right originally, and we agree."

The entire opinion of the State Supreme Court dealing with the matters on review here is appended hereto as Appendix C.

On February 19, 1954, within the time allowed by law, the Owner filed its petition for rehearing. The petition for re-hearing is appended hereto as Appendix B and states that a new issue was presented by the opinion of the Court relative to the amount of damages due the petitioner for the admitted breach of contract; that the only issue on appeal was whether the actual cost of correction of the defect would involve additional damages to the buildings according to the undisputed evidence which, by specific findings of fact, the court found all the issues in favor of the Owner, but denied the Owner's right to recover therefor. The petition further states that the denial of recovery was contrary to the General Conditions of the contract which provided that the Contractor would be liable for all additional damages caused by correction of

defects in the performance of the contract. The petition further alleges that the Court's refusal to decree recovery for the additional damages denied the Owner a vested contract right in violation of the due process and equal protection clauses of the Fourteenth Amendment to the Constitution of the United States, and that such issue had not been theretofore involved on the appeal until raised by the findings of fact in the opinion of the Court. The Owner prayed that it be afforded the opportunity to be heard on the issue and that the Court's decree be modified and damages for the cost of the complete correction of the construction defect be awarded it according to the findings of the Court.

On March 15, 1954, the majority of the Supreme Court of Arkansas denied the petition for re-hearing without opinion, two Justices dissenting and one not participating. The order denying the petition for re-hearing is appended hereto as Appendix A. Thus, the petitioner herein was denied the opportunity to be heard on his alleged constitutional rights at the only time during the entire proceedings when the constitutional question was material to the issue. Prior to the opinion of the Supreme Court on the appeal, the questions of fact giving rise to the petitioner's constitutional right had been decided against it. It was only when the Supreme Court reversed these findings of fact but denied the petitioner the right to recover thereon that the issue of whether the petitioner was being denied the right guaranteed by the Constitution of the United States was presented. This alleged constitutional right was denied to the petitioner by the Supreme Court of Arkansas without affording petitioner the opportunity to be heard in order to protect the right.

F. REASONS FOR ALLOWANCE OF WRIT

I

The Factual Issues Were Found in Petitioner's Favor On Appeal

The Master in Chancery, whose report was adopted as the decree of the trial court, found the following to be the facts:

> "From the evidence, it is my finding that the sum of $73,565.00 would be required to remove the mortar filling placed in the expansion joint, construct an expansion joint, replace the broken, crushed and deteriorated brick and remedy the damage which would be occasioned to the interior of the apartments, and it is my further finding that solely installing the expansion joint as designed would require the expenditure of $1,612.80" (R.25, Appendix K).

After discussing the evidence on this issue, the Master concluded as follows:

> "Rivercliff Company has not met the burden of proof on this issue, but that it is entitled to recover the cost of the installation of the joint in the amount of $1,612.80 under its contract with the plaintiff" (R.26, Appendix K).

These findings of the Master, adopted as the findings of the trial court, were to the effect that the expansion joint could be replaced in its defective condition for the sum of $1,612.80, without incurring additional damages to other work completed in the buildings. Petitioner's exceptions to the Master's findings (R.27, Appendix L), on ground that they were contrary to the evidence, were denied by the Chancery Court and an appeal to the Supreme Court of Arkansas granted (R.28, Appendix M). The appeal was taken on ground that the findings were in error

in that they were contrary to the undisputed facts. (See opinion of the Supreme Court, R.30, Appendix C.) The basis of this contention was that there was no evidence to dispute the established fact that the previous experience of the respondents attempting to remove the mortar from the expansion joints had proven, without dispute, that extensive and substantial damages would result to the adjacent brick wall and to the interior plaster walls of the apartment buildings which would call for the expenditure of the sum of $73,565.00 for complete replacement.

The Supreme Court of Arkansas agreed with the petitioner's contention and found as a fact that the necessary repair could not be made without causing the additional damages. Notwithstanding this finding of fact, the Supreme Court denied the petitioner the right to recover therefor. This particular finding and conclusion of the Supreme Court is quoted as follows:

> "The evidence shows that the contractor made efforts to extract the mortar from the joints and replace it with oakum but found it impracticable to do so because the condition on the brick walls was such that, in the effort, adjacent bricks would be disturbed or damaged and that the interior walls of the apartments would also be extensively damaged. In fact, it appears that to entirely correct the situation it would have been necessary to practically remove and rebuild the corners. This being the situation, it appears that it would do more harm than good to merely dig the mortar from the joints and replace it with oakum. For this reason the Master gave the appellant the amount it would have cost the contractor to build the joints right originally, and we agree" (R.32, Appendix C).

These findings of fact were contrary to the findings of the Master and supported the position taken by the petitioner on the appeal. The conclusions of law that the

respondents would not be liable for the additional and consequential damages, however, were directly contrary to the expressed provisions of the contract between the parties. Article 19 of the general conditions of the contract provides as follows:

> "The contractor shall promptly remove from the premises all materials condemned by the architect as failing to conform to the contract, whether incorporated in the work or not, and the contractor shall promptly replace and re-execute his own work in accordance with the contract and without expense to the owner and shall bear the expense of making good all work of other contractors destroyed or damaged by such removal or replacement" (Exhibit 80, R.8).

The record reveals that on December 13, 1948, the architect condemned the defective installation of the expansion joints and specified the removal and replacement of the defective materials (R.11), and, on a later date, December 6, 1948, specified that the corrective work be completed after the final payment as provided in Article 20 of the general conditions of the contract (R.13, Appendix G). The contractor acknowledged his obligation to perform the replacement work after the final payment of the contract price in his letter to the architect on December 13, 1948 (R.14, Appendix H).

Article 20 of the general conditions of the contract provides that the final payment of the contract price would not relieve the contractor of the responsibility of remedying defects in materials or workmanship and to pay for any damage to other work resulting therefrom. Article 20, *supra*, is quoted as follows:

> "Neither the final certificate nor payment nor any provision in the Contract Documents shall relieve the Contractor of any responsibility for faulty

> materials or workmanship and, unless otherwise specified, he shall remedy any defects due thereto and pay for any damage to other work resulting therefrom, which shall appear within a period of one year from the date of substantial completion. The owner shall give notice of observed defects with reasonable promptness. All questions arising under this article shall be decided by the Architect subject to arbitration" (Exhibit 80, R.8).

Thus, under the facts found by the Supreme Court, the rights of the parties were vested by the contract itself. The petitioner, as owner, was entitled to performance, or its equivalent, of the entire replacement work necessary to make the completed buildings conform to the contract specifications. The Supreme Court of Arkansas, however, has allowed recovery for the cost of the specified expansion joint alone; entirely ignoring and thereby denying petitioner's contract right to recover the entire costs of complete removal and replacement of the defect and the repair of the consequential damages caused thereby. The decision, in effect, rewrites the contract prejudicially to petitioner.

The petition for rehearing (R.33, Appendix B) specifically called attention to the fact that the factual issues on appeal had been found in favor of the petitioner, but that the decision had denied the petitioner a right vested by the admitted contract. The petition further points out that the decision thereby was in violation of the due process and equal protection clauses of the 14th Amendment to the Constitution of the United States. Paragraphs I and II of the petition for re-hearing are quoted as follows:

"I"

> "The only issue on appeal was whether the actual correction costs of the defect would involve additional damages to the buildings according to the

undisputed evidence. By specific findings of fact, this Court found all the issues in favor of the appellant, but denied the appellant the right to recover therefor."

"II"

"Article 19 of the general conditions of the admitted contract provides that the appellee shall be liable for all additional damages caused by correction of the defects in the performance of the contract. Therefore, the Court's refusal to decree recovery therefor denies the appellant of a vested contract right in violation of the due process and equal protection clauses of the Fourteenth Amendment to the Constitution of the United States."

The petition further prays that petitioner be heard on the issue and the appellate decree modified accordingly. Although the Constitutional question was brought into the action for the first time by the decision of the Supreme Court, the right of the petitioner to be heard thereon was denied without comment or reason. The order of the Court (R.34, Appendix A) is quoted as follows:

"The petition for rehearing in this cause is denied.

"The Chief Justice and Justice McFaddin think the petition should be granted. Justice Robinson did not participate in the original determination or in the proceeding on re-hearing."

This petition for review by certiorari has been been filed upon the ground that the action by the Supreme Court of Arkansas on the Constitutional issue raised is not in accord with the applicable decisions of this Court construing the 14th Amendment to the Constitution of the United States. The question is of national importance in that it goes to the question as to what extent the Constitutional

guarantee of due process protects the individual against state judicial revision, modification or outright denial of valid rights vested by contract.

II

The Decision of the Supreme Court of Arkansas Deprives Petitioner of Property Without Due Process of Law

The 14th Amendment to the Constitution of the United States provides as follows:

> "* * *; nor shall any state deprive any person of life, liberty or property, without due process of law;"

The term "person" as used in the Amendment has been often construed to include a corporation. (*Power Mfg. Co.* v. *Saunders,* 274 U.S. 490, 71 L.ed. 1165, 47 S. Ct. 678.) Therefore, there is no issue that the petitioner is entitled to the protection of the Amendment because it is a corporation.

This Court has also held that the state action prohibited in the Amendment includes *judicial* action as well as legislative or administrative action by the state. In *Chicago, B. & Q. R. Co.* v. *Chicago,* 166 U. S. 235, 41 L.ed. 979, 17 S. Ct. 581, this Court made the following declaration:

> "In determining what is due process of law regard must be had to substance, not to form. This Court, referring to the 14th Amendment, has said: 'Can a state make anything due process of law which, by its own legislation, it chooses to declare such? To affirm this is to hold that the prohibition to the states is of no avail, or has no application where the invasion of private rights is effected under the forms of State legislation.' *Davidson* v. *New Orleans,* 96 U. S. 97, 102 (24: 616, 619). The

> same question could be prepounded, and the same answer should be made, in reference to judicial proceedings inconsistent with the requirement of due process of law. If compensation for private property taken for public use is an essential element of due process of law as ordained by the 14th Amendment, then the final judgment of a state court, under the authority of which the property is in fact taken, is to be deemed the act of the state within the meaning of that Amendment."

In the case of *Brinkerhoff-Feris Trust & Sav. Co.* v. *Hill,* 281 U. S. 673, 74 L.ed. 1107, 50 S. Ct. 451, an action was instituted in the Missouri state court to enjoin an alleged unreasonable discrimination in the assessment of state taxes on ground that the taxpayer did not have an adequate remedy at law. The basis of the injunction suit was a former decision of the Supreme Court of Missouri holding that the state tax commission had no power to adjust tax assessments on grounds of unjust discrimination. The trial court dismissed the suit on other grounds, but, on appeal, the Missouri Supreme Court denied relief on the ground that the taxpayer had a remedy to adjust the state taxes before the state tax commission, thereby overruling its former decision to the contrary. By petition for rehearing, the taxpayer raised the constitutional issue that the decision was a violation of due process of law. The petition for re-hearing was denied without opinion. This Court granted certiorari and reversed the Missouri decision on grounds that the denial of a remedy to enforce the taxpayer's property right was a denial of due process of law within the protection of the 14th Amendment. The reasoning of this Court is quoted as follows (281 U. S. 673, 682, 74 L.ed. 1107, 1114):

> "But, while it is for the state courts to determine the adjective as well as the substantive law of the State, they must, in so doing, accord the par-

> ties due process of law. *Whether acting through its judiciary or through its legislature, a state may not deprive a person of all existing remedies for the enforcement of a right, which the state has no power to destroy, unless there is, or was, afforded him some real opportunity to protect it''* (emphasis added).

Is the remedy for private rights vested by contract within the protection of the due process clause of the Constitution? This Court has answered the question in the affirmative. In *Coombs* v. *Getz*, 285 U. S. 434, 76 L.ed. 866, 52 S. Ct. 435, the issue was raised in a review by certiorari from a decision of the Supreme Court of California. A provision of the state constitution granted creditors of corporations a cause of action against the corporate directors for corporate funds embezzled or misappropriated during their term of office. A creditor brought suit on an open account due by the corporation against a director of the corporation under the constitutional remedy. While the appeal to the California Supreme Court was pending, the constitutional provision was repealed. The Supreme Court of California dismissed the appeal on ground that the remedy was abated and denied the petition for re-hearing raising the question of due process of law. On review by certiorari this Court reversed the California decision. Speaking through Justice Southerland, the Court declared its reasoning as follows:

> ''The right of this petitioner to enforce respondent's liability had become fully perfected and vested prior to the repeal of the liability provision. *His cause of action was not purely statutory. It did not arise upon the constitutional rule of law, but upon the contractual liability created in pursuance of the rule. Although the latter derived its being from the former, it immediately acquired an independent existence competent to survive the de-*

struction of the provision which gave it birth. The repeal put an end to the rule for the future, but it did not and could not destroy or impair the previously vested rights of the creditor, which in every sense was a property right (citing cases), to enforce his cause of action" (emphasis added).

After distinguishing the cases where the right to recover was created solely by law rather than by private contract sanctioned by law, the Court concluded as follows:

> "It is settled by decisions of this and other federal courts (*Ettor v. Tacoma*, 228 U. S. 148, 57 L.ed. 773, 33 S. Ct. 428, and cases cited in connection therewith, *supra*) that, upon the facts here disclosed, *a contractual obligation arose; and the right to enforce it, having become vested, comes within the protection of both the contract impairment clause in Art.* 1, *Sec.* 10, *and the due process of law clause in the* 14*th Amendment of the Federal Constitution*" (emphasis added).
>
> "Decree reversed."

According to the rule of *Muhlker* v. *New York & H. R. Co.*, 197 U. S. 544, 570, 59 L.ed. 872, 878, 25 S. Ct. 522, the remedy fixed at the time of the contract is a federal right to be determined ultimately by federal interpretation and construction. The basis for the decision is quoted as follows:

> "And this is the ground of our decision. We are not called upon to discuss the power, or the limitation upon the power, of the courts of New York to declare rules of property or change or modify their decision, *but only to decide that such power cannot be exercised to take away rights which have been acquired by contract and have come under the protection of the Constitution of the United States. And we determine for ourselves the existence and extent of such contract.* This is a truism; and when there is a diversity of state decisions the first in

time may constitute the obligation of the contract and the measure of rights under it" (emphasis added).

In the case at bar, the remedy for defective performance of the contract was incorporated and fixed in the contract by articles 19 and 20 of the general conditions thereof. Thus the parties did not depend upon the continued existence of state law to determine their rights under the contract, but affirmatively specified the obligations and liabilities of each of the parties in the event of a breach of the contract. Under the rule of *Coombs* v. *Getz* and the *Muhlker* cases, *supra*, it is only necessary to determine whether the state law afforded a remedy to enforce the right at the time the rights were vested by the contract. This is not a difficult question for this Court to determine, for in all cases, without exception, that have heretofore come before the Supreme Court of Arkansas involving defective or inadequate performance of a building contract, the court has held that the owner was entitled to recover the entire cost of correcting or completing the defects in performance in order to make the structure literally comply with the specifications of the contract. This remedy has been uniformly maintained by the Arkansas Supreme Court even though the owner has not suffered substantial damages by the contractor's failure to fully perform his contract and the cost of correction exceeds the cost of original performance. *Acme Brick Co.* v. *Hamilton*, 218 Ark. 742, 238 S.W. 2d 658; *Norvell* v. *James*, 217 Ark. 933, 234 S. W. 2d 378; *Harris* v. *Holder*, 217 Ark. 434, 230 S.W. 2d 645; *Day* v. *City of Malvern*, 195 Ark. 804, 114 S.W. 2d 459; *Hill* v. *Cone*, 176 Ark. 697, 3 S.W. 2d 985; *Hollingsworth* v. *Leachville School District*, 157 Ark. 431, 249 S.W. 24; *Roseburr* v. *McDaniel*, 147 Ark. 203, 227 S.W. 397; *Thomas* v. *Jackson*, 105 Ark. 353, 151 S.W. 521; *Mitchell* v. *Caplinger*, 97 Ark. 278, 133 S.W. 1032; and *Fitzgerald* v. *La Porte*, 64 Ark. 34, 40 S.W. 261.

The Supreme Court of Arkansas has further held that its former decisions regarding the rights and remedies of contractual obligations are rules of property in the State of Arkansas, and that rights acquired by contract and the remedies for the enforcement of those rights in effect at the time of the contract are *vested property rights* which cannot be impaired by subsequent legislation or judicial decision. *Hare* v. *General Contract Purchasing Corp.*, 220 Ark. 601, 249 S.W. 2d 973; *Jenkins* v. *Jenkins*, 219 Ark. 219, 242 S.W. 2d 124; and *Coco* v. *Miller*, 193 Ark. 999, 104 S.W. 2d 209.

Thus, up until the time of the decision in the case at bar, it had been a rule of property under the state law that the existing remedy to enforce a vested contract right became incorporated with the contract as a vested property right. This decision apparently seeks to change the rule without regard to the vested rights of the petitioner. Under the Federal authorities cited herein, the petitioner had a vested property right to recover from the respondents, not only the cost of correcting the defect in the performance of the contract, but in addition thereto, to recover the cost of repairing all damages necessarily caused by the correction work, particularly since the remedy was incorporated in the written contract between the parties and sanctioned by the common law of the State at the time the contract was entered. The contract was entered into on July 8, 1947. The Arkansas cases cited above were decided between the years 1897 and 1951 without an exception to the rule declared in those cases. Therefore, there can be no question but that the common law of Arkansas, as declared by the Supreme Court of Arkansas, sanctioned the contract provision for complete recovery in the event of the breach of the contract. According to the decisions of this Court, the State of Arkansas, either through its Legislature or its Supreme Court, could change the exist-

ing remedy or the rule of property in Arkansas, but neither State agency could divest the petitioner of his vested remedy without violating the due process clause of the Fourteeth Amendment to the Constitution of the United States.

III

The Constitutional Issue Was Timely Raised

As previously seen, the question of fact concerning the actual cost of complete replacement of the defective performance had been decided against the contentions of the petitioner until the opinion of the Supreme Court of Arkansas was entered. Since the Master applied the recovery for complete correction provisions of the contract to his findings of fact, there was no question invloved in the action that the petitioner was denied the constitutional property right vested by his contract. When the Supreme Court revised the Master's finding of fact but refused to apply the remedy vested by the contract, the constitutional question arose for the first time, and was timely presented and claimed by the petition for re-hearing. If there is any question whether the petitioner may raise a constitutional issue created by the appellate decision for the first time by petition for re-hearing, the question is affirmatively answered by the rule of *Great Northern Ry. Co.* v. *Sunburst Oil & R. Co.*, 287 U. S. 358, 77 L.ed. 360, 53 S. Ct. 145; *Brinkerhoff-Feris Trust & Sav. Co.* v. *Hill,* 281 U. S. 673, 74 L.ed. 1107, 50 S. Ct. 451; and *Missouri ex rel Missouri Ins. Co.* v. *Gehner,* 281 U. S. 313, 74 L.ed. 870, 50 S. Ct. 326. These Federal cases hold that constitutional questions may be raised for the first time in the state court by a petition for re-hearing of the case on the constitutional issues involved where, on appeal to the state court, the grounds for the appellate decision raise a new and unexpected basis for the issues such as reversal of

former decisions in force at the time the rights of the litigants were established by contract. These cases further hold that, under such circumstances, the state court's refusal to rehear and decide the constitutional issues involved is a denial of due process in violation of the Fourteenth Amendment to the Constitution of the United States.

Under the circumstances in this case, the violation of the petitioner's constitutional rights was duly and timely brought before the Supreme Court of Arkansas. The Court not only denied him protection for his constitutional rights, but denied the petitioner his "day in court" to afford an opportunity to defend his rights guaranteed by the Fourteenth Amendment to the Constitution of the United States. Since the petitioner's constitutional rights were put squarely in issue before the Supreme Court of Arkansas, and the Court has failed to show cause why these rights should be denied, it is within the certiorari jurisdiction of this Court to hear and determine whether the appellant's constitutional rights have been violated by the action of the State Supreme Court and to grant relief accordingly.

IV

CONCLUSION

The decision of the Supreme Court of Arkansas is apparently based upon the conclusion that the petitioner would not be materially benefitted if the contract were enforced according to Articles 19 and 20 of the general conditions thereof. This conclusion may be sound under the findings of collateral facts by the Court, but it is directly contrary to the specific rights vested by the contract between the parties. This Court has consistently construed the due process clause of the Fourteenth Amendment to guarantee the individual the right to contract consistent

with the laws of the State and protects that right against impairment by the State courts. In the case at bar the Supreme Court of Arkansas has directly impaired the rights of the petitioner vested by his contract with the respondents without due process of law or cause shown. Therefore, the petitioner prays that this Court afford him a "real opportunity" to be heard on his prayer for the enforcement of his constitutional rights and to afford the petitioner affirmative relief therefor. The Supreme Court of Arkansas allowed the petitioner to recover only the sum of $1,612.80, whereas his contract vests him with the right to recover the sum of $73,565.00. The balance, in the sum of $71,952.20, is a vested property right denied to petitioner by the State Court without due process of law.

Wherefore, petitioner respectfully prays that this Court review the matters brought before it by this petition and grant the petitioner judgment in the sum of $71,952.20 and other proper relief within the jurisdiction of this Court.

Respectfully submitted

WILLIAM H. DONHAM
527 Pyramid Life Building
Little Rock, Arkansas
Attorney for Petitioner

APPENDIX A

LAW OR CHANCERY MANDATE

STATE OF ARKANSAS)
In the Supreme Court))SCT.

Be it remembered, that at a term of the Supreme Court of the State of Araknsas, begun and held at the Court Room in the State House, in the City of Little Rock, on the 23 day, being the fourth Monday of November, A.D. 1953, amongst others were the following proceedings, to-wit: On the 15 day of March, A.D. 1954, a day of said term:

Rivercliff Co., Inc.,	)	
Appellant	)	Appeal from
No. 149 vs.	)	Pulaski Chancery Court
W. E. Linebarger, et al,	)	First Division District
Appellee	)	

The petition for rehearing in this cause is denied.

The Chief Justice and Justice McFaddin think the petition should be granted. Justice Robinson did not participate in the original determination or in the proceeding on rehearing.

In testimony, that the above is a true copy of the order of said Supreme Court, rendered in the case therein stated, I, C. R. Stevenson, Clerk of said Supreme Court, hereunto set my hand and affix the Seal of said Supreme Court, at my office in the City of Little Rock, this 3 day of June, A.D. 1954.

C. R. Stevenson,
Clerk

By A. G. Sadler,
D. C.

APPENDIX B

SUPREME COURT OF ARKANSAS

APPELLANT'S PETITION FOR RE-HEARING

Appellant states that a new issue has been presented by the decree of this Court relative to the question as to the amount of damages due the appellant for the admitted breach of contract by the appellee in omitting the structural expansion joints between the walls and the frame of the buildings as provided by the construction contract.

I

The only issue on appeal was whether the actual correction costs of the defect would involve additional damages to the buildings according to the undisputed evidence. By specific findings of fact, this Court found all the issues in favor of the appellant, but denied the appellant the right to recover therefor.

II

Article 19 of the general conditions of the admitted contract provides that the appellee shall be liable for all additional damages caused by correction of the defects in the performance of the contract. Therefore, the Court's refusal to decree recovery therefor denies the appellant of a vested contract right in violation of the due process and equal protection clauses of the Fourteenth Amendment to the Constitution of the United States.

III

The constitutional issue was not heretofore involved in this appeal until raised by the decree of this Court,

and the appellant should be afforded the right to be heard on the issue.

Wherefore, appellant prays that a re-hearing be granted on the issue of damages recoverable for the admitted omission of the structural expansion joints, and that the decree be modified and damages for the costs of complete correction for the construction defect be awarded the appellant according to the findings of this Court as to the total amount of such costs, and for all other proper relief.

RIVERCLIFF COMPANY, INC., APPELLANT

WILLIAM H. DONHAM
527 Pyramid Life Building
Little Rock, Arkansas
Attorney for Appellant

(Filed February 19, 1954)

APPENDIX C

SUPREME COURT OF ARKANSAS

OPINION DELIVERED FEBRUARY 8, 1954

WARD, J. This appeal involves the final settlement between the Linebarger Construction Company which constructed Rivercliff Apartments in the City of Little Rock for appellant, or more specifically it involves the alleged errors in the report of the special Master who made certain findings of fact and conclusions of law. All construction was to be performed according to the terms of a detailed contract and plans, and under the direction of an architect. For convenience the appellant, the Rivercliff Company, Inc., which is the owner of the apartments, will be referred to as "Rivercliff", and W. E. Linebarger

and R. W. Linebarger, d.b.a. as Linebarger Construction Co., one of the appellees, will be referred to as "Contractor". The United States Fidelity and Guaranty Company is one of the appellees but makes no separate contentions in this action.

The specific points presented for our consideration come to us in the manner presently set out.

On September 11, 1950, the Contractor filed suit in Circuit Court against Rivercliff to recover the sum of $15,000 alleged to be due under an arbitration award made by the parties pursuant to an earlier attempt to settle their differences. Rivercliff answered that the arbitration award was void, filed a cross-complaint against the Contractor, and moved to transfer to equity. The cause was transferred, where the arbitration award was set aside, and now passes out of the case.

After numerous pleadings and amendments to the pleadings were filed the Chancery Court appointed Rodney Parham as special Master to hear and report findings of fact and conclusions of law for the court's guidance and consideration.

During a period of two years and three months the Master took testimony which, together with numerous exhibits introduced, constitutes a voluminous record, and then submitted his detailed report, awarding to Rivercliff the sum of $29,696. The Master's report was approved in all respects by the court with the exception that the court found a mathematical error in the report and increased the amount due Rivercliff to $31,297, and rendered a decree for that amount.

Rivercliff has appealed from the decree of the court on two issues only, contending that "the Master (and the

court) erred in his conclusions of the law applicable to the uncontested or undisputed facts". Specifically, Rivercliff has appealed on only two issues, both of which will hereafter be separately discussed. The Contractor has cross-appealed, alleging "but one issue" for affirmative relief. As these three issues are discussed below in the order mentioned the testimony (much of which is not disputed) will be referred to in each instance as it is deemed necessary.

1. *Expansion Joints.* The Master allowed Rivercliff the sum of $1,612.80 as compensation for the Contractor's failure to comply with the contract plans and specifications which called for "expansion" joints, one-half inch in width, between the brick walls and the concrete pillars at the corners of each of the four buildings—the space to be filled with oakum which is a pliable substance. It is not disputed that hard mortar was used instead of oakum, and appellant contends this caused serious cracking of the brick, resulting in damage to the extent of approximately $75,000. It is not disputed by the Contractor that the brick has cracked or that the walls are now in poor condition, nor is the amount necessary for a complete repair job seriously denied. The Contractor's defense is that the extensive damage is not the result of failing to use oakum in the joints.

The Master found that it would cost $73,565 to completely correct the condition that now exists, but he also found that the existing condition of the walls was not the result of the failure of the Contractor to comply with the contract specifications.

After a careful review of the testimony and an examination of the plans and drawings, we reach the same conclusion the Master did as to the cause of the damage.

We cannot put our reasons for this conclusion in better words than those used by the Master:

"The plans and specifications show, and an inspection by the Master, at the request of the parties, confirms that the interior or tile pumice block wall and the face brick outer wall are bonded together at the point of the expansion joint by solid brick masonry set in an especially hard mortar. The evidence discloses beyond contradiction that the expansion co-efficient of the inner block wall is greater than that of the outer brick wall and I am of the opinion, based on the testimony of the experts and the physical examination, that all of the major part of the rupture of the brick would have occurred irrespective of the omission of the expansion joint or the creation of the rigid joint by the mortar between the brick and the concrete column, and that the defendant, Rivercliff Company, has not met the burden of proof of this issue, but that it is entitled to recover the cost of the installation of the joint in the amount of $1,612.80 under its contract with the plaintiff."

Appellant presented a number of experts in the architectural and constructural field of engineering to show that no rupture in the walls would have occurred if the joints had been built as they were designed, but a like number and caliber of experts testified for appellees that the rupture would have occurred even though the joints had been constructed according to specifications. The burden was on appellant to sustain its contention, and we cannot say the Master's finding that it has not done so was against the weight of the evidence. The testimony produced on the point considered was conflicting and we recognize that the Master was in a better position than we are to properly evaluate it and correlate it with the plans and designs because he made a personal inspection of the walls of the buildings.

In this connection appellant seeks to sustain its contention on another ground. It is pointed out that when the Contractor's attention was called to the fact that the joints had not been properly caulked and that the walls were in bad condition, the Contractor, in consideration of being paid a balance of $112,713.50, claimed due under the contract, agreed by correspondence to make all necessary repairs, and that it would enter into a contract with a reliable Waterproofing Company to do the job on a guarantee basis. The record supports this contention to some degree and it further shows that it would have cost the amount fixed by the Master to correct all the defects, but the record further shows, we think, that appellee's agreement was to correct the caulking of the joints and not to repair all damage to the brick walls. One of the letters relied on to support the alleged agreement was to the Contractor, dated December 6, 1948, in which the correction work was referred to in this way:

" '2. Caulk and waterproof expansion joints between the outside brick masonry and monolithic concrete corners. This expansion joint was filled with brick mortar which is to be removed and the joints caulked with oakum and mastic compound as per plans and specifications.' "

Another letter to appellee, dated January 18, 1949, demanded that all cracked and broken bricks be removed and replaced by new brick. In appellee's reply the next day he agreed that any broken brick would be *tuckjointed* as had already been done on Building No. 1.

The evidence shows that the Contractor made efforts to extract the mortar from the joints and replace it with oakum but found it impracticable to do so because the condition of the brick walls was such that, in the effort, adjacent bricks would be disturbed or damaged and that the interior walls of the apartments would also be ex-

tensively damaged. In fact, it appears that to entirely correct the situation it would have been necessary to practically remove and rebuild the corners. This being the situation it appears that it would do more harm than good to merely dig the mortar from the joints and replace it with oakum. For this reason the Master gave appellant the amount it would have cost the Contractor to build the joints right originally, and we agree.

We have reviewed all the testimony tending to show that the Contractor agreed to do certain repair work and recognize the force of appellants' argument on this point, but, on the whole, we cannot say the preponderance of the evidence shows that he ever agreed to do all the repair work demanded by appellant, and especially that he did not do so at a time when he fully realized that he might not be legally responsible. It may be significant, as pointed out by appellees, that the joints in question were not designated as "expansion" joints in the specifications, but that this term was apparently adopted after litigation became likely.

• • • • •

The decree of the trial court is affirmed.

The Chief Justice dissents.

Justice Robinson not participating.

(Filed for record on February 8, 1954)

APPENDIX D

SUPREME COURT OF THE UNITED STATES

No. ....., October Term, 1953

RIVERCLIFF COMPANY, INC., *Petitioner*

vs.

W. E. LINEBARGER and R. W. LINEBARGER, d/b/a LINEBARGER CONSTRUCTION COMPANY, and UNITED STATES FIDELITY AND GUARANTY CO.

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

Upon consideration of the application of counsel for petitioner, it is ordered that the time for filing petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including August 2nd, 1954.

/s/ Tom C. Clark

Associate Justice of the Supreme Court of the United States.

Dated this 3rd day of June, 1954.

APPENDIX E

"CONSTRUCTION CONTRACT—LUMP SUM

This agreement made the 8th day of July, 1947, by and between W. E. Linebarger and R. W. Linebarger, d/b/a Linebarger Construction Company (hereinafter called the 'Contractor'), and Rivercliff Company, Inc., and Arkansas Corporation (hereinafter called the 'Owner').

Witnesseth, that the Contractor and the Owner for the consideration hereinafter named agree as follows:

Article 1—Scope of Work.

The Contractor shall furnish all of the materials and perform all of the work within the property lines shown on the Drawings numbered One to Twenty-four, inclusive, and in the Specifications, the pages of which are numeber One to One hundred eight, which said specifications include the "General Conditions of the Contract" consisting of Articles One to Forty-four of the standard form, current edition, of the 'American Institute of Architects' (except as specifically modified in said Specifications) and any Supplemental General Conditions attached thereto. If anything in the said 'General Conditions of the Contract' is inconsistent with this instrument, this instrument shall govern.

The said documents have been prepared by J. Frazier Smith, Inc., therein and hereinafter called the Architect.

A master set of said Drawings and Specifications entitled 'Drawings and Specifications of Rivercliff Apartments, a Rental Housing Project', identified by the Federal Housing Commissioner (hereinafter referred to as the 'Commissioner') and by other parties, shall be placed

on file with the Commissioner and when so filed shall govern (except as herein modified) in all matters which may arise with respect to such drawings and Specifications and General Conditions, and the provisions thereof.

Article 2—Time of Completion.

The work to be performed under this Contract shall be commenced within thirty days from the date of this Agreement, and shall be completed to the satisfaction of the Architect and the Owner within sixteen months from the beginning. In no event, however, shall the work to be performed under this Contract be considered to be completed until all construction items called for in the Drawings and Specifications have been fully completed and the contract price paid in full. It is expressly agreed, however, that in no event shall the contractor or the Surety be liable for any damage resulting from, or for the construction or repair of, any work, damaged or destroyed by any act of God or the public enemy or mobs or riots or civil commotion; and that the Contractor and the Surety shall not be liable for any cessation of work or delay in performance of work caused by direct order of the United States Government or any of its Agencies.

Article 3—The Contract Sum.

The Owner shall pay the Contractor for the performance of the Contract, subject to additions and deductions provided herein on account of construction the sum of $1,140,870.00 cash and in addition thereto, as a fee, 565 shares of the com. capital stock of the Owner. By the execution and delivery of this Agreement the Contractor hereby subscribes for the said shares and agrees that services to be rendered by the Contractor hereunder, when finally completed to the satisfaction of the Commissioner, shall constitute payment therefor: Provided, however, that in

no event shall the Owner be liable to deliver any of said shares to the Contractor nor shall the Contractor be entitled to exercise any rights as a holder of said shares, until final payment is due and payable as herein set forth.

. . . . . .

In witness whereof the parties hereto have respectively set their hands and have caused the seal of the corporate party hereto to be affixed the day and year first given.

LINEBARGER CONSTRUCTION CO.,
Contractor

By /s/ R. W. Linebarger

RIVERCLIFF COMPANY, INC.,
Owner

By /s/ J. F. Smith
President

Attest:

/s/ W. A. Cheek
Secretary

APPENDIX F

"FEDERAL HOUSING ADMINISTRATION—CONTRACT BOND—DUAL OBLIGEE

"Know all Men by These Presents, That We, W. E. Linebarger and R. W. Linebarger d/b/a Linebarger Construction Company of Little Rock, Arkansas (hereinafter called the Principal), and United States Fidelity & Guaranty Company, a Maryland Corporation (hereinafter called the Surety), are held and firmly bound unto Rivercliff Company, Inc., P. O. Box 1206, Little Rock, Arkansas

(hereinafter called the 'Owner-Obligee'), as their respective interests may appear, as Obligees in the sum of One Hundred Fourteen Thousand Eighty-seven and no/100 Dollars ($114,087.00), lawful money of the United States of America, for the payment of which Principal and Surety bind themselves, their heirs, executors, administrators, successors, and assigns jointly and severally, firmly by these presents.

"Whereas, Principal has entered into a Construction Contract of even date herewith with Owner-Obligee for the construction of a Rental Housing Project designated as Rivercliff Apartments (Plans and specifications prepared by J. Frazier Smith, Inc., Architect), a copy of which construction contract is by reference made a part hereof; and

"Whereas, Lender has agreed to lend to Owner-Obligee a sum of money to be secured by a mortgage on said project and to be used in making payments under said Contract, and desires protection as its interests may appear, in event of default by Principal under said Contract, said protection to be subject to the performance by the Obligees, or either of them, of the obligations to Principal in connection with said Contract.

"Now, therefore, the condition of this obligation is such that, if Principal shall well and truly perform all the undertakings, covenants, terms, conditions and agreements of said Contract on its part, and fully indemnify and save harmless Obligees from all cost and damage which they may suffer by reason of failure so to do, and fully reimburse and repay Obligees all outlay and expense which Obligee may incur in making good any such default, and further, that if Principal shall pay all persons who have contracts directly with Principal for labor or materials furnished pursuant to the provisions of said Contract, fail-

ing which such persons shall have a direct right of action against Principal and Surety under this obligation, subject to Obligees' Priority, then this obligation shall be null and void; otherwise it shall remain in full force and effect.

• • • • •

"Signed and sealed this 8th day of July, 1947.

"Signed: Linebarger Construction Company, Principal by R. W. Linebarger, and United States Fidelity and Guaranty Company, Surety, by Thos. T. Wilson, Attorney in Fact."

APPENDIX G

December 6, 1948

Linebarger Construction Co.
115 N. Spring St.
Little Rock, Arkansas

In re: Rivercliff Apartments—
Final Inspection.

Sirs:

At the final inspection of the above captioned project on Wednesday December 1, 1948, the architects found the project substantially complete and for the most part in an acceptable condition. However, there were lots or odds and ends to be completed and other arrangements to be made between the contracting parties before the architects can give their approval for acceptance for final payment.

• • • • •

2. *Holdbacks Not Acceptable.* In accordance with Article 20 of the General Conditions entitled "Correction

of Work After Final Payment", it will be necessary to hold back sufficient cash to pay for the items which are now in the process of being done.

• • • • •

(2) Calk and waterproof expansion joints between the outside brick masonry and monolithic concrete corners. This expansion joint was filled with brick mortar which is to be removed and the joints calked with oakum and mastic compound as per plans and specifications.

• • • • •

Very truly yours,

J. Frazier Smith, F.A.I.A.

For

J. Frazier Smith, Inc.

• • • • •

APPENDIX H

December 13, 1948

Mr. J. Frazier Smith
Architect
404 Goodwyn Institute Building
Memphis, Tennessee

Re: Rivercliff Apartments

Dear Sir:

• • • • •

We have caulked and waterproofed one complete building and have started on the others. As we told you, we have a lump sum contract with Western Waterproofing to

fix these expansion joints and they guarantee their workmanship. The balance unfinished will be allowed you in cash at settlement date.

• • • • •

Yours very truly,

Linebarger Construction Co.

(Signature) R. W. Linebarger

APPENDIX I

12 October 1949

Linebarger Construction Co.
115 N. Spring St.
Little Rock, Arkansas

In re: Rivercliff Apartments—Inspection

Sirs:

On September 8, 1949, this office, in connection with F.H.A. and the owners, inspected the above captioned project. This inspection was in keeping with the General Conditions of the Contract which provides for correction of defective workmanship and materials which are present any time within one year after substantial completion of the project, which according to our records was December 15, 1948.

The following items are defects apparent at this time and in the opinion of the architects shall be corrected at once:

(1) The expansion joints at the junction of brick veneer walls and vertical concrete corner panels at all corners in the four main buildings were not constructed ac-

cording to plans and specifications. The architects have previously given their opinion and decisions on this matter and you were permitted to try out methods of correction with the hopes that same would be successful. This inspection proves that in time your attempt at correction of this trouble has failed and, of course, is unsatisfactory. The architects decision in this matter is that you are to cut out the brick mortar now filling the expansion joint and pack the void with oakum and mastic compound as per plans and specifications.

Very truly yours,

J. Frazier Smith, Inc.

By J. Frazier Smith, F.A.I.A.

APPENDIX J

PULASKI CHANCERY COURT

DEFENDANT'S CROSS COMPLAINT AS AMENDED

(Volume I—Count 2)

"Article 20 of the General Conditions of the construction contract expressly provides: "Neither the final certificate nor payment nor any provision in the contract documents shall relieve the contractor of responsibility for faulty materials or workmanship, and, unless otherwise specified, he shall remedy any defects due thereto and pay for any damage to other work resulting therefrom which shall appear within a period of one year from the date of substantial completion." The construction work under said contract was substantially completed, with certain exceptions, on December 15, 1948, and final payment of the total amount of the lump sum of said contract was paid by the Union Planters National Bank & Trust Com-

pany, mortgagee of Rivercliff, to Linebarger Construction Company on said date. The acceptance of the structures by cross-complainant was conditional that the work would be completed in accordance with the contract documents, said exceptions being noted in memorandum specified as "Punch List" dated December 6, 1948, and delivered to the cross-defendant Linebarger Construction Company. Federal Housing Administration guaranteed a mortgage of $1,200,000.00 executed by Rivercliff Company, Inc., to Union Planters National Bank & Trust Company and an obligee under the bond aforesaid executed by cross-defendants. The items specified in said "Punch List" to be done and performed by Linebarger Construction Company were specified by Federal Housing Administration as well as cross-complainant, and to guarantee performance thereof by Linebarger Construction Company after final payment it was agreed that $6,500.00 of the contract price should be held in escrow by Union Planters National Bank & Trust Company until said work had been completed and the contract fully performed. Linebarger Construction Company has wholly failed and refused to complete said contract or to perform the work set forth in said "Punch List".

"On September 8, 1949, an inspection of the buildings constructed under said contract by the cross-defendant Linebarger Construction Company was made by representatives of the Federal Housing Administration, representatives of cross-complainant and J. Frazier Smith, Inc., Architects. Said inspection revealed numerous defects in said building structures caused solely by faulty materials and faulty workmanship on the part of the cross-defendant Linebarger Construction Company, resulting in extensive damage to all of said buildings and enormous expense to the cross-complainant in repairing and making good the default on the part of said cross-defendant, all of which

appeared within one year from the date of the substantial completion of said contract.

"Cross-complainant alleges that the plans and specifications for the construction of the four main apartment buildings provide for a mastic expansion joint in the brick veneer wall at the junction of the vertical concrete corner panels. In the construction of each of said buildings the cross-defendant Linebarger Construction Company wholly failed to install said expansion joints as provided in said plans and specifications, which said failure resulted in serious cracks developing in the building walls, which said cracks extended through the entire wall structure for the entire height of each of the six-story buildings. Said cracks have caused serious leaks through the walls around the corners of each of said buildings and has also resulted in excessive cracking of the plaster in the various apartment rooms in the buildings. In order to correct defective workmanship and default on the part of the cross-defendant Linebarger Construction Company it will be necessary to remove enough brick at the junction of each of said concrete corners for the entire height of each building and install mastic expansion joints and thereafter replace said brick. "Cross-complainant alleges that the cost of installing said expansion joints as above set forth will amount to $88,322.00 and it has been damaged in said amount by the failure of the cross-defendant Linebarger Construction Company to install same while said buildings were being constructed.

"Wherefore, cross-complainant prays judgment against the cross-defendants on this count of its cross-complaint in the sum of $88,322.00 and for its costs."

APPENDIX K

PULASKI CHANCERY COURT

MASTER'S OPINION—"OMISSION OF EXPANSION JOINTS"

It is agreed that the expansion joints, approximately one-half inch in width, were not installed by the contractor according to the plans and specifications between the interior brick work and tile and the concrete pillars at the point of intersection and that this space was filled with an exceedingly hard mortar and that serious cracking and deterioration of the brick surface at this point of contact at each of the columns has occurred.

The evidence discloses that the architect, J. Frazier Smith, was an officer of Rivercliff Company and it is the finding of the Master that a reasonable inspection of the progress of the work would have disclosed the omission of this expansion joint, but that, since the contractor was under the obligation to perform in accordance with the plans and specifications, and failure to exercise precaution by the owner or its agent, the architect, to see that the work was performed in accordance with the plans and specifications would be no defense to an action for the failure by the contractor to construct the work, and that any damage resulting from the failure to construct the expansion joint as designed would be recoverable by the owner, Rivercliff Company.

From the evidence, it is my finding that the sum of $73,565.00 would be required to remove the mortar filling placed in the expansion joint, construct an expansion joint, replace the broken, crushed and deteriorated brick and remedy the damage which would be occasioned to the interior of the apartments, and it is my further finding that

solely installing the expansion joint as designed will require the expenditure of $1,612.80.

The burden of proof is on the defendant, Rivercliff Company to establish the damage resulting from the failure to construct this expansion joint as designed. A number of outstanding experts in the architectural and constructural engineering fields, including the designer of the project, stated that in their opinion no rupture of the brick work, or little, if any, would have ensued in the event the joint had been constructed as designed. An equal number of like experts who were equally prominent, competent and reliable, testified that in their opinion the rupture would have occurred under the design specified, regardless of the omission of the expansion joint.

The plans and specifications show, and an inspection by the Master, at the request of the parties, confirms that the interior or tile pumice block wall and the face brick outer wall are bonded together at the point of the expansion joint by solid brick masonry set in an especially hard mortar. The evidence discloses beyond contradiction that the expansion co-efficient of the inner block wall is greater than that of the outer brick wall and I am of the opinion, based on the testimony of the experts and the physical examination, that all or the major part of the rupture of the brick would have occurred irrespective of the omission of the expansion joint or the creation of the rigid joint by the mortar between the brick and the concrete column, and that the defendant, Rivercliff Company, has not met the burden of proof of this issue, but that it is entitled to recover the cost of the installation of the joint in the amount of $1,612.80 under its contract with the plaintiff.

APPENDIX L

PULASKI CHANCERY COURT

DEFENDANT'S EXCEPTIONS TO MASTER'S REPORT

Comes the defendant, Rivercliff Company, Inc., and excepts to the Master's Report in the following particulars:

I. The defendant excepts to the findings of the Master as found on pages 2 and 3 of his report under the caption "Omission of Expansion Joints" for the following reasons:

1. That the findings of the Master are contrary to the evidence.

2. That the findings of the Master are contrary to the law.

3. The findings of the Master are based on incompetent evidence, which should be excluded from the record.

Wherefore, defendant prays that the findings of the Master in this particular be set aside and judgment entered for the defendant as prayed in Count 2 as amended, of its Cross Complaint against the plaintiff.

APPENDIX M

PULASKI CHANCERY COURT

DECREE

4. Defendant's, Rivercliff Company, Inc., exceptions to the Master's report be and the same are hereby denied to which order of the Court defendant duly saves exception and prays an appeal which is herewith granted.

5. The Master's report as above amended be and the same is hereby adopted as the Decree of the Court the same as if the said amended Master's report were incorporated herein word for word and judgment in the sum of Thirty-one Thousand Three Hundred and Ninety-seven and no/100 Dollars ($31,397.00) is hereby granted to said defendant, Rivercliff Company, Inc., against plaintiffs, Linebarger Construction Company, et al, and cross defendant, United States Fidelity & Guaranty Company, jointly and severally, for which execution may be had as at law; to which finding an order of the Court the defendant, Rivercliff Company, Inc., duly saves exception and prays an appeal to the Supreme Court which is herewith granted; to which findings an order of the Court the plaintiffs, Linebarger Construction Company, et al, and cross defendant, United States Fidelity & Guaranty Company, duly save exception and pray cross appeal to the Supreme Court which is herewith granted.

It is so ordered.

Dated: October 6, 1952.

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SUPREME COURT OF THE UNITED STATES

RIVERCLIFF COMPANY, INC. ..... *Petitioner*

v. No. .....

W. E. LINEBARGER AND R. W. LINEBARGER, d/b/a LINEBARGER CONSTRUCTION COMPANY AND UNITED STATES FIDELITY AND GUARANTY COMPANY ..... *Respondents*

BRIEF IN OPPOSITION TO PETITION FOR REVIEW ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ARKANSAS

I

STATEMENT OF FACTS

Petitioner seeks by writ of certiorari to review a decision of the Supreme Court of Arkansas. The petitioner contends that the appellate court reversed a finding of fact made in the trial court, and that on such new finding of facts, petitioner was entitled to a particular measure of damages under the terms of the contract sued on and the applicable law. By petition for rehearing before the Arkansas Supreme Court, this construction of the opinion was urged and the assertion made that petitioner's rights under the due process and equal protection clauses of the 14th Amendment of the Constitution of the United States were being denied. Upon this construction of the Arkansas opinion petitioner necessarily rests its case for jurisdiction in this court. It thus becomes both necessary and dispositive of the issues present, to determine what the

opinion of the Supreme Court did and did not find to be the facts in the case.

The background facts in this case are these:

Respondents, as general contractors, undertook to build four apartment buildings according to plans and specifications furnished them by the owner. The buildings were six stories high, with exterior walls of common brick. At each corner the exterior surface was a monolithic concrete column against which the brick walls abutted, there being a half-inch joint between the two. This joint between the brick wall and concrete column ran the entire height of the buildings, and was to have been packed with oakum and sealed with a water-proof mastic compound. This detail in the plans was overlooked by the respondent contractors and ordinary brick mortar was used to fill this joint.

Upon completion of the buildings the brick work adjoining this mortar joint began to crack severely, the cracks being roughly four inches from the mortar filled joint and more or less parallel thereto. At the time of trial these cracks were in many instances several inches wide and the bricks between them and the mortar joint so loose and broken as to be in danger of falling.

The architect assumed upon the appearance of this cracking that it was caused by the use of mortar instead of oakum in the joint adjoining the area which was breaking up. Accordingly he called upon the contractor to rebuild these areas as is set out in petitioner's statement of the case on page 9 of the petition. However, the evidentiary statements there made by petitioner *are not facts found by the Arkansas courts;* that is to say, these letters of the architect there referred to were considered by the trial and appellate courts and it was not determined by

either the trial or appellate court that the architect had "condemned" this work under the contract and rightfully determined that the respondent contractors should replace the mortar with oakum and also rebuild the adjoining broken brick work. To the extent that the statement of the case made on page 9 of the petition gives the impression that *such was a determined fact* in the Arkansas trial or appeal courts *it is in error.* See the opinion of the Supreme Court and that of the Master in the trial court which are set out as Appendix C and Appendix K to the petition respectively and referred to hereafter in the argument. *Rivercliff* v. *Linebarger,* ___ Ark. ___, 264 S.W. 2d 842, 844.

So, too, the petition is misleading when it states (pages 2 and 6) as a matter of fact, *rather than as a matter contended for,* that the Arkansas Supreme Court reversed the findings of the trial court and found that correction of the error of respondent would proximately cause $73,565.00 worth of damage to other work incorporated in the buildings. Petitioner relies upon this *supposed* finding of fact for the granting of the writ of certiorari. Without regard to other reasons dispositive in themselves, petitioner must fail unless he prevails on this point.

Respondent opposes this petition on two grounds: (1) The Arkansas appellate court *made no such change* in the findings of the trial court; and (2) even if the facts had been so found by the Arkansas court, it is mere error of State law not involving petitioner's rights under the 14th Amendment of the Constitution of the United States.

II

REASONS FOR DENIAL OF WRIT OF CERTIORARI

A

PETITIONER IS MISTAKEN IN CONTENDING THE ARKANSAS SUPREME COURT FOUND THAT REPLACEMENT OF THE MORTAR JOINT WOULD PROXIMATELY CAUSE DESTRUCTION OF ADJOINING BRICKWORK

The contractor had used mortar (not oakum) in a half-inch joint between a concrete column and the brick wall. The Arkansas court found that this variation by the contractor *was not the proximate* cause of the cracked and broken condition of the brick walls adjoining the half-inch joint. On this, the pertinent language of the Arkansas opinion is:

> "After a careful review of the testimony and an examination of the plans and drawings, we reach the same conclusion the Master did as to the cause of the damage. We cannot put our reasons for this conclusion in better words than those used by the Master: '. . . and I am of the opinion, based on the testimony of the experts and the physical examination, that *all or the major part of the rupture of the brick would have occurred irrespective of the omission of the expansion joint or the creation of the rigid joint by the mortar between the brick and the concrete column,* and that the defendant, Rivercliff Company, *has not met the burden of proof* of this issue, but that it is entitled to recover the cost of the installation of the joint in the amount of $1,612.80 under its contract with the plaintiff'." *Rivercliff* v. *Linebarger*, ____ Ark. ___, 264 S.W. 2d 842, 844.

Secondly, it was found that the contractor had not subsequently agreed to rebuild the ruptured brickwork

adjoining the mortar joint, but had agreed to replace only the joint itself:

> ". . . The record further shows, we think, that appellee's agreement was to correct the caulking of the joints and not to repair all damage to the brick walls."

It was further stated that the contractor had attempted to perform as he had agreed, but had not done so because:

> "The evidence shows that the contractor made efforts to extract the mortar from the joints and replace it with oakum but found it impracticable to do so *because* the *condition of the brick walls was such* that, in the effort, adjacent bricks would be disturbed or damaged . . ." *Rivercliff* v. *Linebarger*, ___ Ark. ___, 264 S.W. 2d 842, 844, (Appendix B to Petition, p. 33) (emphasis supplied).

Here, note the cause of the damage to the adjoining brick walls during efforts to correct only that work for which the Contractor was liable. The opinion of the Supreme Court referring to the testimony before it (*de novo* as in an appeal from an Arkansas chancery case, *England* v. *Scott*, 205 Ark. 47, 166 S.W. 2d 1014) states:

> ". . . but a like number and caliber of experts testified for appellees (respondents) that the rupture would have occurred even though the joints had been constructed according to specifications." *Rivercliff* v. *Linebarger*, ___ Ark. ___, 264 S.W. 2d 842, 844 (parenthetical matter added).

It was ". . . the condition of the brick walls . . ." which made it impracticable to remove the mortar and replace it with oakum. Herein lies the fallacy of petitioner's position on the facts. The above portions of the opinion are sufficient to dispose of petitioner's claim that it was found that the *repair of the contractor's error* would

cause damage to other work. Only if such were found as a fact by the court would Articles 19 and 20 of the construction contract be operative, as appears from petitioner's own statement of his claim, made on page 24 of the petition herein filed:

> ". . . the petitioner had a vested right to recover from respondents, not only the cost of correcting the defect in the performance of the contract, but in addition thereto, to recover the cost of repairing all damages *necessarily caused* by the correction work, . . ." (emphasis supplied).

The Arkansas court clearly stated that the damage during repair of the joint to the adjoining brickwork resulted only because of its prior bad condition; a defective condition which the Arkansas court, in its first finding above set out, said *was not* in any wise the fault of the respondent contractor.

The court having found that causes, other than performance of the respondent contractor, were responsible for inherent damage, its language cited below immediately becomes clear and purposeful:

> "In fact, it appears that to entirely correct the situation it would have been necessary to practically remove and rebuild the corners. This being the situation it appears that it would do more harm than good to merely dig the mortar from the joints and replace it with oakum. For this reason, the Master gave appellant the amount it would have cost the Contractor to build the joints right originally, and we agree." *Rivercliff* v. *Linebarger*, ___ Ark. ___, 264 S.W. 2d 842.

The foregoing citation clearly reflects the view of the court that, because of the *other* factors of damage, the court did not attribute the cost of the entire rebuilding to the contractor's insertion of mortar in lieu of oakum.

Thus, the court's findings, as a logical, integrated and orderly presentation, deny the petitioner's interpretation —upon which he must solely rely—that the entire cost of removing and rebuilding the corners of the apartment buildings *must* be attributable to this respondent. Petitioner would distort the court's opinion to the extent that the above quoted paragraph be read as fixing responsibility of the contractor. In context, the language of the opinion, from which petitioner draws its theory, simply refers to the practical method of determining costs of the contractor's legal responsibility for the insertion of mortar in lieu of oakum. That is to say, the court's reference, by language, ". . . to entirely correct the situation . . ." is a reference to the general condition that then existed. This was not a finding of fact as to the respective liabilities of the parties, which are fully covered in clear and explicit language in other paragraphs of the opinion. The Arkansas court did not intend to change or alter or add to the finding of the lower court that $1,612.80 would fully compensate petitioner for respondent's performance of the construction contract. This is clear from the last sentence in the above quoted portion of the opinion which definitely states that the Supreme Court agrees with the finding and ruling of the Master. Petitioner admits on page 25 of his petition that the finding of the Master and the trial court was that the $1,612.80 was the cost of removing the mortar and replacing it, without rebuilding the adjoining brick walls which had ruptured. Also on page 14 of the petition it is correctly stated:

> "These findings of the Master, adopted as the findings of the trial court, were to the effect that the expansion joint could be replaced in its defective condition for the sum of $1,612.80, without incurring additional damages to other work completed in the buildings."

The finding of the trial court as to damages, adopted or agreed to by the Arkansas Supreme Court, was:

> ". . . it is entitled to recover the cost of the installation of the joint in the amount of $1,612.80 under its contract with the plaintiff . . ." *Rivercliff* v. *Linebarger*, ___ Ark. ___, 264 S.W. 2d 842 (Appendix K to Petition).

Thus, absent consideration of the ruptured brick walls, which the court has found to result from *other* causes, the entire cost of placing oakum, in lieu of mortar, in the joints has been determined at the level of both trial and appellate court. That cost was $1,612.80.

Further, the figure $1,612.80 is found nowhere in the record of the case ecxept in Exhibit 115 which is appended hereto. (Appendix A, the testimony to which it was affixed does not have a record page number, having been inadvertently omitted and made a part of the record by stipulation of counsel.) This Exhibit was a proposal by a reputable firm which read in part:

> "For this sum we propose to cut out the mortar joint and pack same with oakum and caulking compound."

The rights under Article 19 of the contract between the parties and the rule of damages claimed to be established in the prior Arkansas decisions, cited at page 23 of the petition, are alike inapplicable unless the Arkansas Supreme Court did actually find as a fact that the acts of the contractor could not be corrected without proximately causing such additional damage to the adjoining brickwork as to require its complete removal and rebuilding. No such affirmative holding by the state court is to be found in its opinion. The court's statement that the amount awarded was not for repair, but was the cost of original construction, cannot be made to support peti-

tioner's theory that the Arkansas Supreme Court was departing from, or disagreeing with, the findings of the trial court. This is clearly negated in the specific words of concurrence in, and approval of, the rulings of the trial court found present in the entire opinion. It follows that this petition must then be denied on the facts found by the Arkansas Court.

B

AN ERRONEOUS DECISION ON A QUESTION OF STATE LAW DOES NOT GIVE RISE TO A CLAIM UNDER THE 14TH AMENDMENT OR OTHERWISE CONFER JURISDICTION ON THE SUPREME COURT OF THE UNITED STATES

1

Question Presented Not Within Purview of 14th Amendment

Even if, as is said by petitioner, the Arkansas Supreme Court in its decision, after full hearing, erroneously ignored Articles 19 and 20 of the general conditions of the construction contract here involved and thus denied to petitioner his rights thereunder, there is no violation of the due process clause of the Federal Constitution. The courts of a state have the supreme power to interpret and declare what the law is in all matters not involving a Federal question. *Brinkerhoff-Faris Trust & Savings Co. v. Hill*, 281 U.S. 673, 74 L. Ed. 1107, 50 S.C. 451; *Central Land Co. v. Laidley*, 159 U.S. 103, 112, 40 L.Ed. 91, 94, 16 S.C. 80. Certainly here, where petitioner cited Articles 19 and 20 to the Arkansas court and was allowed to fully present his contention as to their applicability on the facts, he cannot contend that in ruling expressly or otherwise that they did not control, the state court was doing anything more than applying Arkansas law to an Arkansas question.

Under the same principle, this supreme power of a state court to interpret a contract provision includes the power to overrule principles or doctrines established by previous decisions which may have been relied upon or even incorporated in a contract between the parties, without violation of the 14th Amendment. Central Land Co. v. Laidley, *supra;* Brinkerhoff-Faris Trust & Savings Co. v. Hill, *supra.* Under this well settled principle of constitutional law it matters little if the petitioner is correct in alleging that the Arkansas court has silently overruled or disregarded the numerous Arkansas decision cases cited at pages 23 and 24 of his petition. All his allegation amounts to is that a rule of damages incorporated in the contract and existent under prior decisions of the Arkansas court is now being overruled by implication or erroneously overlooked. Nowhere does petitioner point out wherein this supposed act of the state court denies him a hearing or otherwise deprives him of due process. Actually, his position is that he is entitled by the due process clause to what he believes to be a correct application of the Arkansas law to his contract and a correct construction of the terms of that contract on the facts as he supposes them to have been found by the Arkansas court. The term "due process of law" does not guarantee correct decisions by the state courts on questions involving simply state law; nor does it make of every decided case, upon which one might rely, a rule of property which is within the scope of the 14th Amendment. It should be noted that petitioner himself states that the rule of law here involved did not stem from any statute or constitutional provision of the State of Arkansas. (Petition, page 23, 24). Rather, he makes clear that the measure of recovery contended for is found only in the adjudicated cases of the Arkansas court. The asserted reversal of this rule is also the act of the court alone and does not involve legisla-

tive action. Thus it cannot be and is not contended that there has been an impairment of the obligation of contract under Sec. 10, Article I of the Federal Constitution.

For a decision on facts similar to those thought by petitioner to exist here, see *Tidal Oil Co.* v. *Flanagan*, 263 U.S. 444, 68 L.Ed. 382, 44 S.C. 197. A state judgment expressly overruled a prior decision, thereby changing a rule of property of the state on the faith of which the deed, releases and other contracts involved were made. The claim of violation of the 14th Amendment was dismissed as having no substance in the following words found on page 450 of the opinion:

> "The parties to this action have been fully heard in the state court in the regular course of judicial proceedings, and in such a case the mere fact that the state court reversed a former decision, to the prejudice of one party, does not take away his property without due process of law."

Numerous authorities are cited as having expressly held in this manner, among which is Central Land Co. v. Laidley, *supra*. In the latter case a decision of the Supreme Court of West Virginia construing the validity of a deed was said not to have presented a Federal question:

> "When the parties have been fully heard in the regular course of judicial proceedings, an erroneous decision of a state court does not deprive the unsuccessful party of his property without due process of law, within the 14th Amendment of the Constitution of the United States.
>
> • • • • •
>
> "This court, therefore, has no authority to decide the main questions, argued at the bar, whether the decision of the supreme court of appeals of West Virginia, in effect, and erroneously, overruled

the prior decisions of that court . . ." (159 U.S. 103, 112).

The only possible contention coming within the purview of the 14th Amendment is the indication of petitioner (found on page 26 of his petition) that he was denied his "day in court" on the Federal question. In the petition for rehearing addressed to the Arkansas Supreme Court, petitioner set forth his theory of the Federal question thought to be involved. He was free at that time to submit such authorities as in his opinion might support the bare contention. The ruling by the state court upon this petition, which raised but the claim of the Federal question, was in fact a "day in court" thereon. Only if that denial of the claim was an erroneous ruling on a Federal question should this court grant a writ of certiorari. All questions raised by petitioner having been heard by the Arkansas court, it does not appear in what manner or upon what question he was denied due process of law. If the ruling given by the Arkansas court upon the petition for rehearing is a sufficient consideration of the question to justify an assignment of error raising a Federal question, if in fact and in law there is one, then certainly it is sufficient consideration to constitute a "hearing", or a day in court, on that question.

2

The Cases Relied Upon by Petitioner On the Federal Question Are Distinguishable

Muhlker v. *New York & H. R. Co.*, 197 U.S. 544, 49 L. Ed. 872, 25 S.C. 522, contains the strongest language supporting petitioner's view that a change in a state common law rule affecting rights under a contract is a violation of the due process clause.

The Muhlker decision has twice been distinguished on the ground that the court was there following a statute

which in effect took property without compensation and therefore did not govern in a case where no statute was involved. *Tidal Oil Co.* v. *Flanagan*, 263 U.S. 444, 452, 68 L. Ed. 382, 44 S.C. 197; *Ross* v. *Oregon*, 227 U.S. 150, L. Ed. 458, 33 S.C. 220. At page 571 of the United States report of the Muhlker case appears the dissenting opinion of Mr. Justice Holmes. He cites Central Land Co., *supra*, for the proposition that the property owners in a state have no vested right that a general proposition of law shall not be reversed by the courts if the consequences to them will be detrimental. The opinion further points out, the state court had not purported to overrule the prior decisions but had simply decided that they did not extend to the facts of the Muhlker case. Such is the factual situation here.

Justice Holmes stated that under such circumstances this opinion was erroneously holding not only that a state court might not overrule its prior decisions, but that it might not even distinguish those decisions on the facts. He concludes by stating:

> "Bearing in mind that, as I have said, the plaintiff's rights, however expressed, are wholly a construction of the courts, I cannot believe that whenever the 14th Amendment, or Article I, Sec. 10, is set up, we are free to go behind the local decisions on a matter of land law, and, on the ground that we decide what the contract is, declare rights to exist which we should think ought to be implied from a dedication or location if we were the local courts."

In *Chicago, B. & Q. R. Co.* v. *Chicago*, 166 U.S. 226, 41 L. Ed. 979, 17 S.C. 581, the state court was there following a condemnation procedure prescribed by statute. There was no question of a court-made change or reversal of a purely common law rule. It is then inapplicable on the same grounds that distinguish the Muhlker case, *supra*.

In *Combes* v. *Getz*, 285 U.S. 434, 76 L. Ed. 866, 52 S.C. 435, the complainant was denied a remedy, in the sense of an accrued cause of action, by the subsequent repeal of a constitutional provision. At page 25 of the petition it is said that the opinion of the Arkansas Court denies to petitioner "his vested remedy". A "remedy" is the means by which a "right" is enforced or the violation of a right is prevented or compensated. *Black's Law Dictionary* (3d Ed. 1933). The proper measure of damages to be applied in a matter fully heard in the regular course of judicial proceedings is a legal "right"; not a "remedy". Nowhere does petitioner allege facts showing that he has been denied any legal "means" by which this right might be enforced. His sole allegation is that the Arkansas court has refused or failed to apply what petitioner deems to be the correct measure of damages to the facts as he believes them to have been established by the Arkansas court.

It appears from petitioner's own statement of the case of *Brinkerhoff-Faris Trust & Savings Co.* v. *Hill*, 281 U.S. 673, 74 L. Ed. 1107, 50 S.C. 451, that the 14th Amendment had been violated not by the mere change of a common law rule, but because the decision had in fact operated to deny a litigant an opportunity for a hearing at any stage of the proceedings. Such is not the result of the decision here complained of, for in the Arkansas court petitioner was fully heard upon his proposition. He exhaustively argued that on the facts he was entitled to have the rule of damages for which he contended applied to the facts as he saw them. Further, in the petition for rehearing he raised the question as to his rights under the 14th Amendment of the Constitution.

III

CONCLUSION

The claim of petitioner that he has here been denied a "remedy" falls on two grounds:

First, the Arkansas court has not found the facts as claimed by petitioner and therefore had no occasion to consider the rule of damages he contends for; and

Secondly, even if the facts had been found as thought by petitioner, the Arkansas court may have, after full hearing, erred in a matter of purely state law, which is no violation of petitioner's right to due process of law.

Wherefore, respondent prays that this court deny the petition for review on writ of certiorari to the Supreme Court of the State of Arkansas.

Respectfully submitted

E. Chas. Eichenbaum
Suite 3, 12th Floor, Boyle Building
Little Rock, Arkansas

Edward L. Wright
1025 Pyramid Life Building
Little Rock, Arkansas
Counsel of Record for Respondents

Of Counsel
Wm. M. Moorhead
Suite 3, 12th Floor, Boyle Building
Little Rock, Arkansas

APPENDIX A

Exhibit 115

209-11 East Markham St. Little Rock, Ark.
Telephone 42494

J. E. HORNIBROOK CO.
BONE DRY
ROOFING AND SHEET METAL

Proposal
&
Contract

Date February 21, 1951
Subject Rivercliff Apts.

To Linebarger Construction Company
222 Scott Street
Little Rock, Arkansas, hereinafter
called the Owner

J. E. Hornibrook Co., hereinafter called the Company, herewith submits proposal for furnishing and installing materials, according to the following specifications, for the sum of $1,612.80.

As per your request, we have examined the vertical construction joint on the subject job.

For this sum we propose to cut out the mortar joint and pack same with Oakum and caulking compound.

For your information this price is broken down as follows:

One corner 56 ft. @ 60c per ft.	$	33.60
48 corners @ $33.60 per corner		1,612.80
Our price is based on all necessary scaffolding by others.		
Oakum & Caulking Compound		.15
Labor to cut joint		.10
Labor to pack joint		.15
Ins. & Tax on labor		.03
Misc., Drills & Waste, etc.		.02
		.45
Overhead and profit		.15
	$	.60

It is further understood that:

(a) This agreement shall become binding under the laws of the State of Arkansas only upon the owner's written acceptance hereof or upon the Company's commencing performance and upon such acceptance or commencement of performance this shall constitute the entire contract and be binding upon the parties hereto, there being no covenants, promises or agreements, written or oral, except as herein set forth.

(b) The owner agrees to keep property mentioned in this agreement properly insured against loss by fire including the Company's interest therein.

(c) The Company shall not be responsible for damage or delay due to strikes, fires, accidents or other causes beyond its reasonable control.

(d) The Company carries Employers and Public Liability Insurance.

(e) Material to be our standard construction unless otherwise stated.

(f) This proposal is limited to .....15..... days acceptance from date hereof.

(g) Above proposal accepted on foregoing terms and conditions .....19.....

By (Signature) J. E. Hornibrook

J. E. Hornibrook Co.

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SUPREME COURT OF THE UNITED STATES

RIVERCLIFF COMPANY, INC. ..... *Petitioner*

v. No. 244, October Term, 1954

W. E. LINEBARGER and R. W. LINEBARGER, d/b/a LINEBARGER CONSTRUCTION COMPANY and UNITED STATES FIDELITY AND GUARANTY COMPANY ..... *Respondents*

REPLY BRIEF

I

The Federal Right in Issue Here is a Vested Contract Right, Not a Common Law Right

The respondent contends that the only right in the issue before this Court is the petitioner's common law remedy for breach of contract for the admitted failure of the contractor to install the structural expansion joint in the buildings according to the detailed plans and specifications. If this were the only issue brought forward by the petition for review, it is true that the petitioners would have no cause within the jurisdiction of this Court. However, the issue raised by this petition does not involve the common law of Arkansas, but goes directly to the question of whether the due process clause of the Fourteenth Amendment to the Constitution of the United States guarantees to the petitioner a right *vested by contract*. The basic contract right has been involved from the inception of the case, and the problem here will be

materially simplified if reference is made to the record, starting with the filing of the petitioners' cross-complaint against the respondents (App. C, Petition, page 45).

Briefly, the cross-complaint alleges that the contractor's performance of the contract was *incomplete* due to his *failure and refusal to perform the corrective work called for by the general conditions of the contract* in the event of defect in the performance. The cross-complaint further alleges that the contractor failed to install the mastic expansion joint called for by the detailed plans and specifications for the construction of the project, and that the contractor's failure to install the said expansion joint resulted in serious cracking in the walls of the building, serious leaks in the walls around the corners of said buildings and excessive cracking of the plaster upon the interior of the buildings and, in addition thereto, the cost of correcting the defective performance would be enormous, due to the expense of removing the defective materials, replacing them with proper materials and repairing the damages caused thereby. The cross-complaint further prays judgment against the respondents herein in the total sum of $88,322.00 as damages for the failure of the contractor to install the expansion joint while the buildings were being constructed.

Thus, the petitioner's cross-complaint alleges two separate grounds for recovery. The first was in the nature of misfeasance or damages to the buildings in exterior and interior cracking and leaking of the walls of the buildings resulting from the contractor's failure to install the expansion joint. The second ground for additional recovery was in the nature of nonfeasance or the contractor's refusal to fully perform the contract terms by assuming the cost of removal, replacement and complete repair of all other damages caused by the removal and replace-

ment of the defective materials. The petitioner's first grounds for recovery for the damages to the buildings proximately caused by the contractor's failure to install the expansion joint depended entirely upon the common law of the State of Arkansas. But, petitioner's right to recover the cost of complete replacement of the defective expansion joint was founded in the contract in Articles 19 and 20 thereof which provide as follows:

> "Art. 19. *Correction of Work Before Final Payment.*—The contractor shall promptly remove from the premises all materials condemned by the architect as failing to conform to the contract, whether incorporated in the work or not, and the contractor shall promptly replace and re-execute his own work in accordance with the contract and without expense to the owner, and shall bear the expense of making good all the work of other contractors destroyed or damaged by such removal or replacement" (Exhibit 80, R.8).

Article 20 is a related provision extending the time for the discovery of the defects and the demand for their correction after the final payment had been made.

At the trial, the respondents admitted the contract, and admitted that the contractor had failed to install the expansion joint as designed.

As to the petitioner's first ground for recovery, the trial court found that the petitioner failed to prove the damages to the buildings resulted from the contractor's failure to install the joint, but allowed recovery in the sum of $1,612.80 as damages for the contractor's neglect to install the joint properly. As for petitioner's second ground for recovery for the cost of removal, replacement and repair of all the damages caused by the removal and replacement of the defective materials, the trial court made no findings or conclusions relative to the right of the peti-

tioners to recover under the terms of the contract, outside of making a finding of fact that the sum of $73,565.00 would be required to remove the mortar filling the joint, construct the joint and repair the damage which would be occasioned to the exterior and interior of the apartments.

An appeal was taken on grounds that the undisputed evidence indicated that the contractor could not extract the mortar from the joints and replace it with oakum without causing extensive damages to the exterior and interior walls of the apartments and the petitioner was entitled to the entire cost for complete repair.

In the opinion of the Supreme Court of Arkansas (App. C, Petition, page 31-36), the Court affirmed the finding of the trial court that the damages to the buildings had not been caused by the contractor's failure to install the expansion joint according to the plans and specifications. The Court also confirmed the finding that it would cost $73,565.00 to completely correct the defective expansion joint. However, the Supreme Court of Arkansas went further and found that the mortar in the joints could not be removed and replaced with oakum without causing extensive damage to the exterior brick walls and the interior walls of the apartments, and that to correct the defect it would be necessary to practically remove and rebuild the corners of the buildings. This portion of the opinion is re-quoted below for the convenient comparison with Article 19 of the contract:

> "The evidence shows that the contractor made efforts to extract the mortar from the joints and replace it with oakum, but found it impracticable to do so because the condition of the brick walls was such that, in the effort, adjacent bricks would be disturbed or damaged and that the interior walls of the apartments would also be extensively damaged. In fact, it appears that to entirely correct

the situation it would have been necessary to practically remove and rebuild the corners. This being the situation, it appears that it would do more harm than good to merely dig the mortar from the joints and replace it with oakum. For this reason the Master gave appellant the amount it would have cost the contractor to build the joints right originally, and we agree'' (App. C, Petition, page 35-36).

The above finding of fact is exactly what Article 19 of the contract contemplates and for which a remedy is provided. Although the Supreme Court found that the value of the right granted by Article 19 of the contract was $73,565.00, it refused to provide petitioner a remedy for protecting this vested contract right, thereby depriving him of the right itself.

When it was timely called to the attention of the State Supreme Court that petitioner's right to recover the entire cost of correcting the expansion joint defect was founded upon contract protected by the due process clause of the Fourteenth Amendment to the Constitution of the United States, the Court denied petitioner the right to be heard on the question.

Thus, it is seen that from the inception of the case petitioner has claimed that his right to recover for the cost of correction of the defective performance was created and controlled by the contract. Although the State Court found circumstances and facts which vested the right of recovery by the terms of the contract, it failed to afford petitioner a remedy to enforce his vested contract right, thereby denying him due process of law.

II

Respondents' Attack on the Finding of the Supreme Court is Unfounded in the Opinion of the Court

The finding of fact by the Supreme Court of Arkansas, that any attempt to extract the mortar from the defective expansion joints and replace it with oakum would result in extensive damages to the interior and exterior of the buildings, is now attacked by the respondents on two grounds. For its first ground, respondent attempts to construe the words "condition of the brick walls" to mean a damaged or ruptured condition of the brick walls. This construction is refuted by the same paragraph in which the quoted words appear. The brick adjacent to the point where the mastic joint was designed to be located is rigidly bound to the concrete corner column by the hard brick mortar. Thus, that part of the brick wall that would be involved in the removal of the mortar and the replacement thereof would not be damaged or otherwise defective. This is further indicated by the Court's statement that the adjacent brick would be "disturbed or damaged" by the extraction of the mortar. This latter statement would indicate that the brick adjacent to the proposed joint was not damaged, or, at least, would be inflicted with additional damage if the mortar were extracted. Obviously, the only construction that could be placed upon the words "condition of the brick walls" would be a reference to the defective mortar joint rigidly binding the concrete corner column to the adjacent bricks.

The construction placed on this statement by the respondents is also refuted by the Court's statement in the same paragraph that the interior walls of the apartments would "also be extensively damaged". As carefully pointed out in the opinion by the Supreme Court of Ar-

kansas, the rupture or present damage to the buildings is on the exterior wall thereof and has no connection with the interior walls of the apartments which are not damaged or in a defective condition at the present time. From this statement, obviously, all damage to the interior walls would be the direct result from the removal and replacement of the proposed expansion joint. The Court's intention that all damages derived by the correction work would be in addition to whatever damages were sustained to the exterior walls of the building, is confirmed by the Court's observation that "it would do more harm than good to merely dig the mortar from the joints and replace it with oakum."

When the statement of the Supreme Court of Arkansas is considered in full, the proposed construction by the respondent is totally without merit.

For its second ground of attack on the finding of the Supreme Court of Arkansas, respondent contends that the Supreme Court did not intend to change the finding of the lower court nor add thereto, because the Supreme Court affirmed the judgment allowed by the lower court. By this argument, respondent attempts to construe the effect of the opinion to mean that the sum of $1,612.80 would fully cover the entire cost of replacement and repair of the damages caused by the replacement. It is respectfully submitted that the respondent is asking this Court to go beyond its jurisdiction to *review the decree rendered by the highest Court of the State* by certiorari where any right is set up and claimed under the Constitution (Title 28, U.S.C.A., Section 1257(3)). The question before this Court is a review of the decree of the Supreme Court of Arkansas to determine whether it has deprived the petitioner of any right set up and claimed under the Constitution. The findings of fact, whether erroneous

or not, are conclusive upon this Court and the parties hereto.

Furthermore, if the Supreme Court of Arkansas had intended that the sum of $1,612.80 would fully cover the entire cost of complete correction, it would not have held that there would be additional damages to the adjacent bricks and also damages to the interior of the apartments. It would not have classified the sum of $1,612.80 as "the amount it would have cost the contractor to build the joints right originally", nor would it have observed that it would cost $73,565.00 to completely correct the faulty installation of the joint if the Court had intended that $1,625.80 would fully cover all cost of correction.

In spite of the finding of the trial court or the evidence to support the lower court's finding, it is the obvious intent of the Supreme Court of Arkansas to limit the petitioner's right of recovery to the value of the omitted expansion joint and to deny the petitioner a remedy to recover his contract right for the complete cost of the removal and proper replacement of the existing defective joint.

On pages 6 and 8 of the response to the petition, respondents admit that Article 19 of the contract would apply if the Supreme Court of Arkansas has found that the defective mortar can not be removed and replaced without causing additional damages to other work in the building. The petitioner submits that the Supreme Court of Arkansas has made the specific finding, and, for the very reason that additional damages will occur in the corrective work, the Supreme Court denied the right provided for in Article 19 of the contract. The petitioner timely set up and claimed this right under the Constitution of the United States, but the Supreme Court of Ar-

kansas has denied him a hearing or a remedy for the enforcement of the right.

III

The Issue Presented is not a Question of State Law

The respondents contend that the petitioner's right to recover on the contract was wholly dependent upon State law and that no constitutional right was involved. Respondents base this contention on the fact that the Supreme Court of Arkansas has, in effect, reversed themselves on their former decisions as to the measure of damages for a breach of contract which they had the right and power to do without violating the Constitution of the United States. The petitioner certainly agrees that the Supreme Court of Arkansas has reversed their former decisions on the common law of the State. But the right of the petitioner to recover in this action was not dependent upon the common law of Arkansas. The former decisions of the Arkansas Supreme Court are significant here, not to show the basis of the petitioner's right to recover, but merely to show that the right was not illegal at the time it was vested and created by the contract. The petitioner set up his contract right and claimed recovery under the authority of the due process clause of the Fourteenth Amendment to the Constitution of the United States. The Supreme Court of Arkansas specifically denied the petitioner a hearing or a remedy for the enforcement of the petitioner's alleged constitutional right. Thus, the sole question before this Court at this time is whether the petitioner's contract right to recover the complete cost of correction of the defect in the performance of the contract is guaranteed by the due process clause of the Fourteenth Amendment to the Constitution of the United States.

The petitioner certainly agrees with the respondents that the Supreme Court of Arkansas has in effect ruled that the petitioner has no right of recovery under the State law. But the question here is whether the petitioner has a right of recovery under the Constitution of the United States. The Supreme Court of Arkansas refused to entertain the question, and in this respect, the question can not be distinguished from the case of *Coombes* v. *Getz*, 285 U.S. 434, 76 L. Ed. 866, 52 Sup. Ct. 435, extensively cited in the petition. In fact, the case at bar is much stronger, for in the case here, the contract right of recovery is expressly provided in the contract, whereas in *Coombes* v. *Getz, supra*, the right of recovery was incorporated in the contract by implication from the State law at the time the contract was made. The respondents' contentions here are the same as the respondents' contentions in *Coombes* v. *Getz, supra*, that a contract remedy is not vested, but wholly dependent upon the remedies provided by the law of the State. This argument was rejected by this Court on grounds that when a lawful contractual obligation arises, the right to enforce it becomes vested and within the protection of the due process clause of the Fourteenth Amendment to the Constitution of the United States, and not subject to defeasance on the part of the State.

The respondents next contend that the petitioner has been afforded due process of law on the Federal question presented here because, under the State law, petitioner was allowed and did file his petition for the Supreme Court of Arkansas to re-hear the case and grant relief guaranteed by the due process clause of the Fourteenth Amendment. Apparently, respondent is contending that the State Court's denial to hear the petitioner's presentation of the Federal question amounted to due process of law because it was a "day in court". To affirm this contention is to hold that the prohibition of the due process clause of the

Fourteenth Amendment has no effect, for the State Court would be at liberty to construe, or even deny, the rights, privileges and immunities vested by the Constitution of the United States with no power in this Court to enforce its construction of the Constitution. Under the rule of *Coombes* v. *Getz, supra,* and *Brinkerhoff-Feris Trust & Sav. Co.* v. *Hill,* 281 U.S. 673, 74 L. Ed. 1107, 50 Sup. Ct. 451, the due process of law means that the State judiciary must furnish an adequate remedy for the protection of the vested constitutional right of the individual. The petitioner contends here that it has fully established a constitutional right to recover, but was deprived of that right by the action of the State Supreme Court in its refusal to grant the petitioner a remedy therefor.

IV

The Cases Relied upon by the Respondent Do Not Pertain to the Issue Here

Considering the fact that the question presented here is whether the petitioner had a constitutional right to recover according to the obligation of the right, the cases cited by the respondent in its brief have no application to the case at bar.

The first case cited by the respondent, *Tidal Oil Co.* v. *Flanagan,* 263 U.S. 444, 68 L. Ed. 382, 44 Sup. Ct. 197, was a decision on Article I, Section 10 of the Constitution of the United States. In that case, this Court held that a decision of the State Courts does not come under the provisions of Article I, Section 10 of the Constitution, inasmuch as the constitutional provision is directed to the Legislatures of the States, not the courts. Also, in *Tidal Oil Co.* v. *Flanagan, supra,* the State Court had held a deed to be void and no rights vested thereby. This Court refused to overturn the State Court's finding of fact that the con-

tract was void on grounds that no constitutional rights were vested by void contract. *Tidal Oil Co.* v. *Flanagan, supra,* is clearly distinguishable from the case at bar in that the State Supreme Court did not find that the contract in issue here was void, on the contrary, the contract was admitted and all facts giving rise to the application of the contract were found in favor of the petitioner here.

In *Ross* v. *Oregon*, 227 U.S. 150, 57 L. Ed. 458, 33 Sup. Ct. 220, this Court held that a State statute passed before the time of an offense committed by the defendant was not an *ex post facto* law within the meaning of Article I, Section 10 of the Constitution, even though the statute was not construed until after the offense was committed. *Ross* v. *Oregon, supra,* has no application to the case at bar, for no rights are claimed under Article I, Section 10 of the Constitution of the United States, nor is there any State statute involved in the question here.

The only other case cited by respondent is the case of *Central Land Co.* v. *Laidley,* 159 U.S. 103, 40 L. Ed. 91, 16 Sup. Ct. 80. In that case, this Court held that the impairment of contract clause of Article X, Section 2 of the Constitution applied only to the Legislature of the State, and a State Court's erroneous construction of the State statute did not impair the obligation of contract where the statute was passed and effective before the contract arose.

In all the cases cited by the respondent, the rights of the parties were dependent upon or created by State law. The primary distinction of the case at bar from the cases cited by respondent is best stated in the language of the opinion in the case of *Coombes* v. *Getz, supra,* quoted as follows:

> "The right of this petitioner to enforce respondent's liability had become fully perfected and vested prior to the repeal of the liability provision. His

> cause of action was not purely statutory. It did not arise upon the constitutional rule of law, but upon the contractual liability created in pursuance of the rule. Although the latter derived its being from the former, it immediately acquired an independent existence competent to survive the construction of the provisions which gave it birth. The repeal put an end to the rule for the future, but it did not and could not destroy or impair the previously vested rights of the creditor, which in every sense was a property right (citing cases), to enforce his cause of action."

It is signficant that the respondents have not tried to distinguish the cases of *Coombes* v. *Getz, supra,* or *Brinkerhoff-Feris Trust & Sav. Co.* v. *Hill, supra,* relied upon by the petitioner to support his contentions here. *Coombes* v. *Getz, supra,* clearly states that the enforcement of a contract right is within the protection of the due process clause of the Fourtenth Amendment and can not be denied by the State's judiciary on grounds that the State law does not provide a remedy. *Brinkerhoff-Feris Trust & Sav. Co.* v. *Hill, supra,* clearly holds that due process of law demands that the State judiciary afford a remedy for the enforcement of a constitutional right. The decisions in these two cases are the grounds upon which the petitioner requests this review before this Court.

V

CONCLUSION

The question presented here is whether the State Court may refuse to hear or provide a remedy for a contract right claimed under the due process clause of the Fourteenth Amendment to the Constitution of the United States. This Court has jurisdiction to review, by certiorari, the decree of the State Court for the contract right

was specifically set up and claimed under the Constitution in the State action. The petitioner has clearly revealed that the action on the part of the Supreme Court of Arkansas is contrary to the settled decisions of this Court construing the due process clause of the Fourteenth Amendment to the Constitution. The general nature of the question is certainly of such national importance to require the consideration and decision of this Court to clarify and confirm the former decisions of this Court concerning the specific question involved. For this reason, petitioner earnestly contends that the writ of certiorari should be issued to the Supreme Court of Arkansas to review the final decree of that Court involving the Federal question involved here.

Respectfully submitted

WILLIAM H. DONHAM
527 Pyramid Life Building
Little Rock, Arkansas
Attorney for Petitioner